UNITED STATES DIS	TRICT COURT	
NORTHERN DISTRIC	T OF NEW YORK	
FRANK CUSTODERO all others similarly situa	, on behalf of himself and ted,	STATEWIDE CLASS ACTION COMPLAINT
-against-	Plaintiff,	5:20-CV-1320 (MAD/ATB)
APPLE, INC.,		
	Defendant.	

Plaintiff Frank Custodero, on behalf of himself and others similarly situated, brings this action against defendant Apple, Inc., to recover money lost to illegal gambling pursuant to General Obligations Law § 5-421. *See also* N.Y. Penal Code §§ 225.00 through 225.95. Apple promotes, enables, and profits from games downloaded from its App Store and played by numerous New York residents that constitute illegal gambling under the statutory law and the strong public policy of the state of New York. Plaintiff seeks to represent a class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

PARTIES, JURISDICTION, AND VENUE

- 1. Plaintiff Frank Custodero is an adult resident citizen of the state of New York, residing in Jefferson County, New York.
- 2. Defendant Apple, Inc. is a corporation organized and existing under the laws of the state of California, with its principal place of business in Cupertino, California. Apple does business by agent in this state, district, and division.

- 3. This is a class action brought by New York citizens against a California company. The amount in controversy exceeds \$5 million, exclusive of interest and costs. Subject matter jurisdiction exists pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d).
- 4. Venue is proper under 28 U.S.C. § 1391(b)(2), because this is a "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."

FACTUAL BACKGROUND

- 5. Apple is the most valuable company in the world, with a market capitalization exceeding \$2 trillion as of mid-2020. It is by far the world's biggest technology company, now roughly double the size of both Microsoft Corporation and Alphabet Inc., the parent company of Google, respectively. Gone are the days when Steve Jobs's little company began its quixotic quest to take market share away from Microsoft's dominance of the computer software market with its introduction of the upstart MacIntosh personal computer. Applications for personal computers, both desktops and laptops, are now a relatively small part of the software market. Mobile devices are now the name of the game and Apple undisputedly dominates that lucrative market.
- 6. Apple's operating system for the iPhone smartphone and the iPad tablet, known as the iOS, is a rigidly controlled closed system that has the ability to run numerous applications, or apps, available exclusively through Apple's App Store. Apple takes up to 30% of all revenue generated by app sales in the App Store and in-app purchases made on apps obtained through the App Store. Millions of software developers make applications for the Apple iOS. In order to sell apps in the App Store, developers must submit their programs to Apple, which then decides whether the app may be included in the App Store and thus downloaded to iOS devices.

2

Apple takes 30% of all initial app purchases and in-app purchases made during the first year after the customer downloads the app. After that, the percentage drops to 15%.

- 7. Many apps, including those that are the subject of this lawsuit, are initially free to download but contain in-app purchases that a customer can choose to purchase inside the app. Apple provides the payment interface for all such purchases and, as noted, takes a hefty percentage of the money for itself. A 30% processing fee is many times the charge that other payment processors outside the Apple ecosystem, such as Western Union, charge for processing such payments.
- 8. The money charged for in-app purchases is paid to Apple. An Apple customer is required to provide a method of payment, usually a credit or debit card, for all purchases made in the App Store, including in-app purchases. Apple then has a contractual obligation to the software developers to remit a portion of the money Apple receives from the purchases, typically 70%, to the developers. This contractual arrangement is between Apple and the developers who sell products in the App Store. As between plaintiff and the class members and Apple, however, all inapp and other purchases involve the payment of money *to Apple*, not the developers.
- 9. This case concerns Apple's profiting from illegal gambling machine games that it sells in its App Store. Apple and its chief mobile device software competitor, Google, both allow customers to purchase games that are no more or no less than casino-style slot machines, casino style table games, and other common gambling games.
- 10. There are numerous such gambling games that Apple makes available in the App Store, and there is very little variation on how they work. When a customer downloads the game and opens it for the first time, the customer has a set number of free starting "coins," for example, 100,000 or 1,000,000, to play the slots. The games themselves work precisely like a casino slot machine or other games in Las Vegas. In addition to slots, customers can play blackjack, roulette, poker, keno, bingo, and other card and gambling games. A loss results in a loss of "coins," but the

customer has the chance to win more coins. Eventually a customer runs out of coins, and is prompted to use real money to buy more coins for the opportunity to keep playing the game. Hundreds of these games exist. The following table contains the 200 most popular games.

	Clataranaia TM Marca Coning Clata	404	Lucius Blass Casina - Clata Casas
1	Slotomania™ Vegas Casino Slots	101	Lucky Play Casino Slots Games
2	Jackpot Party - Casino Slots	102	Vegas Downtown Slots & Words
3	DoubleDown™- Casino Slots Game	103	Slots-Fortune 777 Classic Slot
	Playtika Santa Monica, LLCBingo Blitz™ - Bingo	404	Condition Class Miles de 6 Feet en
4	Games	104	Gambino Slots Wheel of Fortune
5	Cashman Casino Las Vegas Slots	105	mychoice casino jackpot slots
6	Cash Frenzy™ - Slots Casino	106 107	FoxwoodsONLINE
	7 World Series of Poker - WSOP		Gold Fortune Casino
8	Heart of Vegas Slots-Casino	108	GSN Grand Casino: Slots Games
9	POP! Slots ™ Live Vegas Casino	109	Take5 Casino - Slot Machines
10	House of Fun™ - Casino Slots	110	Bid Wars: Pawn Empire
11	Lightning Link Slots-Casino	111	Slots Master-Vegas Casino Game
12	Big Fish Casino: Slots & Games	112	Slots of Vegas
13	DoubleU Casino: Vegas Slots	113	Slingo Arcade - Bingo & Slots
14	Huuuge Casino Slots Vegas 777	114	PokerStars Play – Texas Holdem
15	VEGAS Slots – Casino Slots	115	Blazing 7s Casino: Slots Games
16	Caesars® Casino: Vegas Slots	116	Mystic Slots: Fun Casino Games
17	Jackpot Magic Slots™ & Casino	117	Lucky City™ - 3D Slot Machine
18	Lotsa Slots: Casino SLOTS	118	Governor of Poker 3 - Friends
19	Hit it Rich! Lucky Vegas Slot	119	Casino Roulette: Roulettist
20	my KONAMI - Real Vegas Slots	120	Seminole Social Casino
21	Bingo Party! Lucky Bingo Games	121	Blackjack∙
22	Zynga Poker - Texas Holdem	122	Tap Poker Social
23	Wizard of Oz: Casino Slots	123	Slots-Heart of Diamonds Casino
24	Quick Hit Slots - Casino Games	124	Triple Win Slots-Vegas Casino
25	Jackpot Mania™ - DAFU Casino	125	Texas Holdem - Scatter Poker
26	Game of Thrones Slots Casino	126	MONOPOLY Bingo!
27	Gold Fish Casino Slots Games	127	San Manuel Slots
28	Cash Tornado Slots - Casino	128	Wheel of Fortune Slots
29	Scatter Slots - Vegas Casino	129	Ultimate Slots: Casino Slots
30	Billionaire Casino Slots 777	130	Lucky Slots: Vegas Casino
31	Double Win Slots Casino Game	131	Stardust Casino™ Slots - Vegas
32	Texas Hold'em Poker: Pokerist	132	Slots of Vegas - Slot Machine
33	Bingo Journey - Classic Bingo	133	Xtreme Slots
34	Bingo Bash: Online Bingo Games	134	Video Poker Deluxe Casino
35	Bingo Story Live Bingo Games	135	Win Vegas Slots Casino: Nascar
36	Willy Wonka Slots Vegas Casino	136	Bid Wars: Storage Auctions
37	Poker Face - Live Texas Holdem	137	Coin Trip

39 GSN Casino: Slot Machine Games 40 Bingo Pop - Bingo Games 41 88 Fortunes Slots Casino Games 42 MONOPOLY Slots - Casino Games 43 Vegas Live Slots Casino 44 Ignite Classic Slots 45 Hot Shot Casino - Slots Games 46 Wynn Slots - Slots Games 47 Wilde Classic Slots 48 Slots - Slots Games 49 Wynn Slots - Las Vegas Casino 40 Wynn Slots - Las Vegas Casino 41 Slot Bonanza- 777 Vegas casino 42 High Kleasic Vegas Casino 43 Slots - Classic Vegas Casino 44 HighRoller Vegas: Casino Slots 45 Hot Shot Casino - Slots Games 46 Wynn Slots - Las Vegas Casino 47 Wild Classic Slots™ Casino 48 Slots - Classic Vegas Casino 49 Slot Machines 777 - Slots Era 49 Video Poker by Ruby Seven 50 Club Vegas Slots: Casino 777 50 Slots Craze: Casino Games 20; 51 Blackjack 21: Blackjackist 52 Tycoon Casino™ - Vegas Slots 53 Double Hit Casino: Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N' Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 50 Slots Double Down Fort Knox 50 Slots Double Rort Knox 51 Backgammon - Lord of the Board 52 Backgammon - Lord of the Board 53 Double Rict ! Vegas Casino Slots 54 Poker Heat: Texas Holdem Poker 55 Poker Heat: Texas Holdem Poker 56 Golden Casino - Vegas Slots 57 Poker Heat: Texas Holdem Poker 58 Slots Golden Casino - Vegas Slots 59 Poker Heat: Texas Holdem Poker 50 Poker Heat: Texas Holdem Poker 51 Poker Right in America 52 Poker Heat: Texas Holdem Poker 53 Poker Heat: Texas Holdem Poker 54 Baba Wild Slots - Vegas Casino	30	Classia Casina Clata Carrara	430	David Clat Marking Course
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41 88 Fortunes Slots Casino Games 42 MONOPOLY Slots - Casino Games 42 Logas Live Slots Casino Games 43 Vegas Live Slots Casino 44 Logas Live Slots Casino 45 Hot Shot Casino - Slots Games 46 Wynn Slots - Las Vegas Casino 47 Wild Classic Slots ** Casino Casino 48 Slots ** Casino Casino Club Vegas Casino 48 Slots - Classic Vegas Casino 49 Slot Machines 777 - Slots Era 49 Slot Machines 777 - Slots Era 50 Club Vegas Slots: Casino 777 51 Blackjack 21: Blackjackist 51 VIP Poker - Texas Holdem 52 Tycoon Casino ** - Vegas Slots 53 Double Hit Casino: Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N' Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Winl Classic Slots Game 50 Slots DoubleDown Fort Knox 51 Casino Games - Infinity Slots 52 Backgammon - Lord of the Board 53 Bouble Rich ! Vegas Class Double Rich Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N' Cash Casino Slots 56 Slots DoubleDown Fort Knox 57 Cash Mania - Casino Slots 58 Slots Golden HoYeah-Casino Slot 59 Huge Winl Classic Slots Game 59 Huge Winl Classic Slots Game 50 Slots DoubleDown Fort Knox 51 Casino Games - Infinity Slots 52 Backgammon - Lord of the Board 53 Double Rich ! Vegas Casino Slots 54 Poker Night in America 55 Poker Heat: Texas Holdem Poker 56 Golden Casino - Vegas Slots 57 Blackjack 21 - HOB 58 Slots Poker Poke				
42 MONOPOLY Slots - Casino Games 43 Vegas Live Slots Casino 44 Ignite Classic Slots 45 Hot Shot Casino - Slots Games 46 Wynn Slots - Las Vegas Casino 47 Wild Classic Slots™ Casino 48 Slots - Classic Vegas Casino 48 Slots - Classic Vegas Casino 49 Slot Machines 777 - Slots Era 50 Club Vegas Slots: Casino 777 510 Slots Craze: Casino Games 20 512 Tycoon Casino™ - Vegas Slots 52 Tycoon Casino™ - Vegas Slots 53 Double Hit Casino: Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N¹ Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Cash Maria - Casino Slots 68 High Soard to Riches Slots 69 Show Me Vegas Slots Game 60 Blackjack 21: Blackjack Casino Slots 61 Casino Games - Infinity Slots 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Royal Slots: Casino Slots 68 Bligh S Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billinio Cash Slots: Slots Game 173 Multi-Strike Poker™ 174 Vegas Slots - 7Heart Casino 75 DoubleDown Classic Slots 76 Bonus Slots: Slots Game 177 Real Casino Slots 77 Real Slots: Pokerist 78 Poker Poker Poker Poker 79 DoubleDown Classic Slots 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billinio Cash Slots: Slots Game 175 Fantasy Springs Slots Casino 776 DoubleDown Classic Slots 78 Hugh Transprings Slots Casino 79 DoubleDown Classic Slots 70 Texas Holdem Poker 71 Texas Holdem Poker 72 Billion Cash Slots: Slots Slots 74 Vegas Slots - 7Heart Casino 75 DoubleDown Classic Slots		<u> </u>		
43 Vegas Live Slots Casino 44 Ignite Classic Slots 45 Hot Shot Casino - Slots Games 46 Wynn Slots - Las Vegas Casino 47 Wild Classic Slots™ Casino 48 Slots - Classic Vegas Casino 48 Slots - Classic Vegas Casino 48 Slots - Classic Vegas Casino 49 Slot Machines 777 - Slots Era 50 Club Vegas Slots: Casino 777 510 Slots Craze: Casino Games 20 51 Blackjack 21: Blackjackist 52 Tycoon Casino™ - Vegas Slots 53 Double Hit Casino: Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N' Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino 5lots 64 Pokerrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Ras Holdem Poker 68 High S Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Holdem Poker 71 Texas Holdem Poker 72 Bonus Casino Slots 73 Real Casino: Vegas Casino 74 Vegas Slots: Casino Police 75 Poker Heat: Texas Holdem Poker 76 Blackjack 21 - HOB 77 Texas Poker: Pokerist Pro 78 Slots Golden Casino: Vegas Slots 79 Slow Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots: Slots Game 173 Hult 7 Casino: Vegas Slots 74 Vegas Slots - Pharabris Best Bet Casino™ 75 DoubleDown Classic Slots 76 Bonus Casino Slots 77 Texas Holdem Poker 78 Blackjack 21 - HOB 79 Real Slots: Pokerist Pro 170 Vegas Craps by Pokerist 71 Texas Holdem Poker 72 Billion Cash Slots: Slots Game 173 Hult 7 Casino: Vegas Slots 74 Vegas Slots - Theart Casino 75 DoubleDown Classic Slots 175 Fantasy Springs Slots Casino 75 DoubleDown Classic Slots				
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45 Hot Shot Casino - Slots Games 46 Wynn Slots - Las Vegas Casino 47 Wild Classic Slots™ Casino 48 Slots - Classic Vegas Casino 48 Slots - Classic Vegas Casino 49 Slot Machines 777 - Slots Era 49 Slot Machines 777 - Slots Era 50 Club Vegas Slots: Casino 777 51 Slots Garee: Casino Games 20: 51 Blackjack 21: Blackjackist 52 Tycoon Casino™ - Vegas Slots 53 Double Hit Casino: Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N¹ Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots- Games 73 Multi-Strike Poker™ 74 Vegas Slots: Deluxe Casino 75 DoubleDown Classic Game 76 Blackjack 21 HOB 77 Texas Holdem Poker 77 Texas Holdem Poker 78 Billion Cash Slots- Casino Slots 79 Blackjack 21 HOB 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 71 Texas Holdem Poker 72 Billion Cash Slots- Casino Slots 73 Hit 7 Casino Slots 74 Vegas Slots - 7 Heart Casino 75 DoubleDown Classic Slots 76 DoubleDown Classic Slots Casino 77 Texas Holdem Poker 78 Billion Cash Slots- Casino Game 79 Billion Cash Slots- Casino Game 71 Texas Holdem Poker 71 Texas Holdem Poker 72 Billion Cash Slots- Casino Game 73 Multi-Strike Poker™ 74 Vegas Slots - 7 Heart Casino 75 DoubleDown Classic Slots 76 Billion Cash Slots- Casino Game 77 Heal Slots Best Bet Casino™ 78 DoubleDown Classic Slots 79 DoubleDown Classic Slots 70 DoubleDown Classic Slots 71 Fentasy Springs Slots Casino 75 DoubleDown Classic Slots	_		143	
46 Wynn Slots - Las Vegas Casino 47 Wild Classic Slots™ Casino 48 Slots - Classic Vegas Casino 48 Slots - Classic Vegas Casino 49 Slot Machines 777 - Slots Era 50 Club Vegas Slots: Casino 777 51 Slots Craze: Casino Games 207 51 Blackjack 21: Blackjackist 52 Tycoon Casino™ - Vegas Slots 53 Double Hit Casino: Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N¹ Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 50 Slots DoubleDown Fort Knox 51 Blackgammon - Lord of the Board 52 Empire City Casino Slots 53 Slots Pharaoh's Way 54 Bingo Showdown -> Bingo Live! 55 Rock N¹ Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 159 Empire City Casino Slots 60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 173 Hit 7 Casino: Vegas Slots 74 Vegas Slots - 7Heart Casino 75 DoubleDown Classic Slots 175 Fantasy Springs Slots Casino Monthing Slots Best Bet Casino™ 75 DoubleDown Classic Slots	44		144	
47 Wild Classic Slots™ Casino 48 Slots - Classic Vegas Casino 48 Slots - Classic Vegas Casino 49 Slot Machines 777 - Slots Era 50 Club Vegas Slots: Casino 777 50 Club Vegas Slots: Casino 777 51 Slots Backjack 21: Blackjackist 52 Tycoon Casino™ - Vegas Slots 53 Double Hit Casino: Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N¹ Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Will Classic Slots Game 60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Slots 64 Pokerrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Texas Poker: Pokerist Pro 77 Texas Poker: Pokerist Pro 78 Texas Holdem Poker 79 Texas Poker: Pokerist Pro 79 Texas Poker: Pokerist Pro 79 Texas Poker: Pokerist 71 Texas Holdem Poker 71 Texas Holdem Poker 72 BolubleDown Classic Slots 73 Hit 7 Casino Slots 74 Vegas Slots - 7Heart Casino 75 DoubleDown Classic Slots 76 Slots - Phara Slots Slots Slots 77 Texas Holdem Poker 78 Hit 7 Casino: Vegas Slots 79 Slots Poker: Pokerist Pro 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots - Casino Game 73 Multi-Strike Poker™ 74 Vegas Slots - 7Heart Casino 75 DoubleDown Classic Slots 75 DoubleDown Classic Slots 76 DoubleDown Classic Slots 77 Fantasy Springs Slots Lasino Slots 78 Fantasy Springs Slots Lasino Slots 79 DoubleDown Classic Slots 70 Fantasy Springs Slots Lasino Slots 71 Texas Holdem Poker 72 Fantasy Springs Slots Lasino Slots Lasin	45	Hot Shot Casino - Slots Games	145	Slots™
48 Slots - Classic Vegas Casino 49 Slot Machines 777 - Slots Era 50 Club Vegas Slots: Casino 777 51 Blackjack 21: Blackjackist 51 Blackjack 21: Blackjackist 52 Tycoon Casino™ - Vegas Slots 53 Double Hit Casino: Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N' Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 59 Huge Win! Classic Slots Game 50 Slots Double Down Fort Knox 51 Casino Games - Infinity Slots 52 Backgammon - Lord of the Board 53 Double Rich! Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N' Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 59 Huge Win! Classic Slots Game 59 Hoge Win! Classic Slots Game 50 Slots DoubleDown Fort Knox 51 Casino Games - Infinity Slots 52 Backgammon - Lord of the Board 53 Double Rich! Vegas Casino Slots 54 Pokerrrr 2- Holdem, OFC, Omaha 55 Poker Heat: Texas Holdem Poker 56 Golden Casino - Vegas Slots 57 Blackjack 21 - HOB 58 High 5 Casino: Home of Slots 59 Hoge Win! Classic Slots Game 60 Blackjack 21 - HOB 61 Forgon King Fishing Online 62 Backgambor - Lord of Hold Slots 63 Double Rich! Vegas Casino App 64 Pokerrrr 2- Holdem OFC 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 74 Vegas Slots - 7Heart Casino 75 DoubleDown Classic Slots	46		146	
49 Slot Machines 777 - Slots Era 149 Video Poker by Ruby Seven 50 Club Vegas Slots: Casino 777 150 Slots Craze: Casino Games 202 51 Blackjack 21: Blackjackist 151 VIP Poker - Texas Holdem 52 Tycoon Casino™ - Vegas Slots 152 Cash Dozer: Lucky Coin Pushe 53 Double Hit Casino: Vegas Slots 153 VIP Deluxe Slot Machine Gam 54 Bingo Showdown -> Bingo Live! 154 Vegas Slots: Deluxe Casino 55 Rock N' Cash Casino Slots 155 Casino Frenzy-Fantastic Slots 56 Winning Slots Las Vegas Casino 156 Video Poker - Classic Games 57 Cash Mania - Casino Slots 157 Epic Diamond Slots: Casino Fu 58 Slots GoldenHoYeah-Casino Slot 158 Ellen's Road to Riches Slots 59 Huge Win! Classic Slots Game 159 Empire City Casino Slots 60 Slots DoubleDown Fort Knox 160 Diamond Sky: Slots & Lottery 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 169 Bingo Infinity 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 173 Hit 7 Casino: Vegas Slots 174 Real Slots Best Bet Casino™ 75 DoubleDown Classic Slots	47	Wild Classic Slots™ Casino	147	Slot Bonanza- 777 Vegas casino
50 Club Vegas Slots: Casino 777 150 Slots Craze: Casino Games 202 51 Blackjack 21: Blackjackist 151 VIP Poker - Texas Holdem 52 Tycoon Casino™ - Vegas Slots 152 Cash Dozer: Lucky Coin Pushe 53 Double Hit Casino: Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N' Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 59 Huge Win! Classic Slots Game 60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 173 Hit 7 Casino: Wegas Slots Casino 74 Vegas Slots Best Bet Casino™ 175 DoubleDown Classic Slots Casino Slots 175 Fantasy Springs Slots Casino™ 175 DoubleDown Classic Slots 175 Fantasy Springs Slots Casino™ 175 DoubleDown Classic Slots Casino Slots 175 Fantasy Springs Slots Casino™ 175 DoubleDown Classic Slots Casino Slots 175 Fantasy Springs Slots Casino™ 175 DoubleDown Classic Slots Casino Slots 175 Fantasy Springs Slots Casino™ 175 DoubleDown Classic Slots Casino Slots 175 Fantasy Springs Slots Casino Slots 176 Fantasy Springs Slots Casino Slots 177 Fantasy Springs Slots Casino Slots 178 Fantasy Springs Slots Casino Slots 179 Fantasy Springs Slots Casino Slots 170 Vegas Closs Best Bet Casino™ 175 Fantasy Springs Slots Casino Slots 176 Fantasy Springs Slots Casino Slots 177 Fantasy Springs Slots Casino Slots 178 Fantasy Springs Slots Casino Slots 179 Fantasy Springs Slots Casino Slots 170 Vegas Casino Slots Casino Slots 175 Fantasy Springs Slots Casino Slots 176 Fantasy Springs Slots Casino Slots 177 Fantasy Springs Slots Casino Slots 178 Fantasy Springs Slots	48	Slots - Classic Vegas Casino	148	HighRoller Vegas: Casino Slots
51 Blackjack 21: Blackjackist 52 Tycoon Casino™ - Vegas Slots 53 Double Hit Casino: Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N' Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich ! Vegas Casino Slots 64 Pokerrrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 75 DoubleDown Classic Slots 74 Vegas Slots - Pheart Casino 75 DoubleDown Classic Slots 76 BoubleDown Classic Slots 77 Pentagy Springs Slots Lottery 159 Casino Games 150 Ellen's Road to Riches Slots 151 Ellen's Road to Riches Slots 152 Empire City Casino Slots 153 Ellen's Road to Riches Slots 154 Ellen's Road to Riches Slots 155 Empire City Casino Slots 156 Diamond Sky: Slots & Lottery 150 Light Poker Night in America 157 Empire City Casino Slots 158 Ellen's Road to Riches Slots & Lottery 150 Light Poker Night in America 151 Poker Night in America 152 Empire City Casino Slots 163 HOLD'EM OR FOLD'EM 164 Pokerrrr 2- Holdem, OFC, Omaha 165 Poker Heat: Texas Holdem Poker 166 Baba Wild Slots - Vegas Casino 167 Blackjack 21 - HOB 168 Praia Bingo - Bingo Games 169 Show Me Vegas Slots Casino App 169 Bingo Infinity 170 Texas Poker: Pokerist Pro 170 Vegas Craps by Pokerist 171 Real Casino Slots 172 Bonus of Vegas Slots Casino 173 Multi-Strike Poker™ 174 Real Slots Best Bet Casino™ 175 DoubleDown Classic Slots	49	Slot Machines 777 - Slots Era	149	Video Poker by Ruby Seven
52 Tycoon Casino™ - Vegas Slots 53 Double Hit Casino: Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N' Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino - Vegas Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 House Milling Slots Casino 73 Multi-Strike Poker™ 75 DoubleDown Classic Slots 153 VIP Deluxe Slots Instancing Auchine Gam 154 Vegas Slots - Pleart Casino 155 Video Poker - Classic Slots 156 Video Poker - Classic Games 157 Epic Diamond Slots: Casino Fu 157 Epic Diamond Slots: Casino Fu 158 Ellen's Road to Riches Slots 158 Ellen's Road to Riches Slots 159 Empire City Casino Slots 160 Diamond Sky: Slots & Lottery 161 Casino Games - Infinity Slots 162 Backgammon - Lord of the Board 163 Poker Night in America 164 Poker Night in America 165 Slots - Pharaoh's Way 166 Poker FloU'EM 167 Poker Heat: Texas Holdem Poker 168 Baba Wild Slots - Vegas Casino 169 Bingo Adventure 169 Bingo Infinity 170 Texas Poker: Pokerist Pro 170 Vegas Craps by Pokerist 171 Real Casino Slots 172 Billion Cash Slots-Casino Game 173 Multi-Strike Poker™ 174 Real Slots Best Bet Casino™ 175 DoubleDown Classic Slots	50	Club Vegas Slots: Casino 777	150	Slots Craze: Casino Games 2020
53 Double Hit Casino: Vegas Slots 54 Bingo Showdown -> Bingo Live! 55 Rock N' Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 74 Vegas Slots - 7Heart Casino 75 DoubleDown Classic Slots 153 VIP Deluxe Slots Best Bet Casino™ 154 Vegas Slots Best Bet Casino™ 155 Casino Frenzy-Fantastic Slots 156 Video Poker - Classic Slots Casino Fu Vegas Slots 156 Video Poker - Classic Games 157 Epic Diamond Slots: Casino Fu 158 Ellen's Road to Riches Slots 158 Ellen's Road to Riches Slots 160 Diamond Sky: Slots & Lottery 160 Diamond Sky: Slots & Lottery 161 Poker Night in America 162 Slots - Pharaoh's Way 163 Double Rich! Vegas Casino Slots 164 Slingo Adventure 165 Dragon King Fishing Online 166 Golden Casino - Vegas Slots 166 Baba Wild Slots - Vegas Casino 167 Royal Slots: Slot Machine Game 168 Praia Bingo - Bingo Games 169 Bingo Infinity 170 Vegas Craps by Pokerist 171 Real Casino Slots 172 Bonus of Vegas Slots Casino 173 Milti 7 Casino : Vegas Slots 174 Vegas Slots - 7 Heart Casino 175 DoubleDown Classic Slots	51	Blackjack 21: Blackjackist	151	VIP Poker - Texas Holdem
54 Bingo Showdown -> Bingo Live! 55 Rock N' Cash Casino Slots 56 Winning Slots Las Vegas Casino 57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 50 Slots DoubleDown Fort Knox 51 Casino Games - Infinity Slots 52 Backgammon - Lord of the Board 53 Double Rich! Vegas Casino Slots 54 Poker Heat: Texas Holdem Poker 55 Poker Heat: Texas Holdem Poker 56 Blackjack 21 - HOB 57 Blackjack 21 - HOB 58 Blilion Cash Slots-Casino App 59 Finia Bingo - Bingo Games 60 Slots Doublem Fort Knox 50 Double Rich! Vegas Casino Slots 50 Dragon King Fishing Online 51 Poker Heat: Texas Holdem Poker 52 Blackjack 21 - HOB 53 Blackjack 21 - HOB 54 Praia Bingo - Bingo Games 55 Billion Cash Slots-Casino Game 56 Show Me Vegas Slots Casino App 57 Casino Frenzy-Fantastic Slots 58 Video Poker - Classic Games 59 Show Me Vegas Slots Casino App 50 Slots Double Rich! Vegas Casino Game 51 Dragon King Fishing Online 52 Billion Cash Slots-Casino App 53 Bingo Infinity 54 Vegas Casino Slots 55 Praia Bingo - Bingo Games 56 Show Me Vegas Slots Casino Game 57 Casino Slots Slots Casino Game 58 Billion Cash Slots-Casino Game 59 Show Me Vegas Slots Casino Game 50 Showled Never The Real Casino Slots 50 Billion Cash Slots-Casino Game 50 Billion Cash Slots-Casino Game 50 DoubleDown Classic Slots 51 Fantasy Springs Slots Casino The Fantasy Springs Slots Casi	52	Tycoon Casino™ - Vegas Slots	152	Cash Dozer: Lucky Coin Pusher
55Rock N' Cash Casino Slots155Casino Frenzy-Fantastic Slots56Winning Slots Las Vegas Casino156Video Poker - Classic Games57Cash Mania - Casino Slots157Epic Diamond Slots: Casino Fu58Slots GoldenHoYeah-Casino Slot158Ellen's Road to Riches Slots59Huge Win! Classic Slots Game159Empire City Casino Slots60Slots DoubleDown Fort Knox160Diamond Sky: Slots & Lottery61Casino Games - Infinity Slots161Poker Night in America62Backgammon - Lord of the Board162Slots - Pharaoh's Way63Double Rich! Vegas Casino Slots163HOLD'EM OR FOLD'EM64Pokerrr 2- Holdem, OFC, Omaha164Slingo Adventure65Poker Heat: Texas Holdem Poker165Dragon King Fishing Online66Golden Casino - Vegas Slots166Baba Wild Slots - Vegas Casino67Blackjack 21 - HOB167Royal Slots:Slot Machine Gam68High 5 Casino: Home of Slots168Praia Bingo - Bingo Games69Show Me Vegas Slots Casino App169Bingo Infinity70Texas Poker: Pokerist Pro170Vegas Craps by Pokerist71Texas Holdem Poker171Real Casino Slots72Billion Cash Slots-Casino Game172Bonus of Vegas Slots Casino73Multi-Strike Poker™173Hit 7 Casino: Vegas Slots74Vegas Slots - 7Heart Casino174Real Slots Best Bet Casino™75<	53	Double Hit Casino: Vegas Slots	153	VIP Deluxe Slot Machine Games
56Winning Slots Las Vegas Casino156Video Poker - Classic Games57Cash Mania - Casino Slots157Epic Diamond Slots: Casino Fu58Slots GoldenHoYeah-Casino Slot158Ellen's Road to Riches Slots59Huge Win! Classic Slots Game159Empire City Casino Slots60Slots DoubleDown Fort Knox160Diamond Sky: Slots & Lottery61Casino Games - Infinity Slots161Poker Night in America62Backgammon - Lord of the Board162Slots - Pharaoh's Way63Double Rich! Vegas Casino Slots163HOLD'EM OR FOLD'EM64Pokerrr 2- Holdem, OFC, Omaha164Slingo Adventure65Poker Heat: Texas Holdem Poker165Dragon King Fishing Online66Golden Casino - Vegas Slots166Baba Wild Slots - Vegas Casino67Blackjack 21 - HOB167Royal Slots:Slot Machine Gam68High 5 Casino: Home of Slots168Praia Bingo - Bingo Games69Show Me Vegas Slots Casino App169Bingo Infinity70Texas Poker: Pokerist Pro170Vegas Craps by Pokerist71Texas Holdem Poker171Real Casino Slots72Billion Cash Slots-Casino Game172Bonus of Vegas Slots Casino73Multi-Strike Poker™173Hit 7 Casino : Vegas Slots74Vegas Slots - 7Heart Casino174Real Slots Best Bet Casino™75DoubleDown Classic Slots175Fantasy Springs Slots Casino <td>54</td> <td>Bingo Showdown -> Bingo Live!</td> <td>154</td> <td>Vegas Slots: Deluxe Casino</td>	54	Bingo Showdown -> Bingo Live!	154	Vegas Slots: Deluxe Casino
57 Cash Mania - Casino Slots 58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 75 DoubleDown Classic Slots 158 Ellen's Road to Riches Slots 168 Pantasy Springs Slots 168 Casino 179 Poker Slots 169 Poker Slots 170 Poker Slot	55	Rock N' Cash Casino Slots	155	Casino Frenzy-Fantastic Slots
58 Slots GoldenHoYeah-Casino Slot 59 Huge Win! Classic Slots Game 60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 75 DoubleDown Classic Slots 158 Ellen's Road to Riches Slots 169 Empire City Casino Slots 160 Diamond Sky: Slots & Lottery 160 Diamond Sky: Slots & Lottery 161 Poker Night in America 162 Slots - Pharaoh's Way 163 HOLD'EM OR FOLD'EM 164 Slingo Adventure 165 Dragon King Fishing Online 166 Baba Wild Slots - Vegas Casino 167 Royal Slots:Slot Machine Game 168 Praia Bingo - Bingo Games 169 Bingo Infinity 170 Vegas Craps by Pokerist 171 Real Casino Slots 172 Bonus of Vegas Slots Casino 173 Hit 7 Casino: Vegas Slots 174 Real Slots Best Bet Casino™ 175 DoubleDown Classic Slots	56	Winning Slots Las Vegas Casino	156	Video Poker - Classic Games
59 Huge Win! Classic Slots Game 60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 75 DoubleDown Classic Slots 169 Diamond Sky: Slots & Lottery 160 Diamond Sky: Slots & Lottery 160 Diamond Sky: Slots & Lottery 160 Diamond Sky: Slots & Lottery 161 Diamond Sky: Slots & Lottery 162 Diamond Sky: Slots & Lottery 163 Diamond Sky: Slots & Lottery 164 Poker Night in America 165 Slots - Pharaoh's Way 166 Slots - Pharaoh's Way 167 Slots Slots Gaventure 168 Baba Wild Slots - Vegas Casino 169 Baba Wild Slots - Vegas Casino 169 Bingo Infinity 169 Bingo Infinity 170 Vegas Craps by Pokerist 171 Real Casino Slots 172 Bonus of Vegas Slots Casino 173 Multi-Strike Poker™ 174 Real Slots Best Bet Casino™ 175 DoubleDown Classic Slots	57	Cash Mania - Casino Slots	157	Epic Diamond Slots: Casino Fun
60 Slots DoubleDown Fort Knox 61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 75 DoubleDown Classic Slots 166 Diamond Sky: Slots & Lottery 161 Poker Night in America 162 Slots - Pharaoh's Way 163 HolD'EM OR FOLD'EM 164 Slingo Adventure 165 Dragon King Fishing Online 166 Golden Casino - Vegas Slots 166 Baba Wild Slots - Vegas Casino 167 Royal Slots:Slot Machine Gam 168 Praia Bingo - Bingo Games 169 Bingo Infinity 170 Vegas Craps by Pokerist 171 Real Casino Slots 172 Bonus of Vegas Slots Casino 173 Hit 7 Casino: Vegas Slots 174 Real Slots Best Bet Casino™ 175 DoubleDown Classic Slots	58	Slots GoldenHoYeah-Casino Slot	158	Ellen's Road to Riches Slots
61 Casino Games - Infinity Slots 62 Backgammon - Lord of the Board 63 Double Rich! Vegas Casino Slots 64 Pokerrrr 2- Holdem, OFC, Omaha 65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 75 DoubleDown Classic Slots 166 Poker Night in America 167 Poker Night in America 168 HolD'EM OR FOLD'EM 169 Slingo Adventure 169 Dragon King Fishing Online 160 Baba Wild Slots - Vegas Casino 160 Baba Wild Slots - Vegas Casino 161 Poker Night in America 162 Slots - Polaraoh's Way 163 HolD'EM OR FOLD'EM 164 Slingo Adventure 165 Dragon King Fishing Online 166 Baba Wild Slots - Vegas Casino 167 Royal Slots: Slots Machine Gam 168 Praia Bingo - Bingo Games 168 Praia Bingo - Bingo Games 169 Bingo Infinity 170 Vegas Craps by Pokerist 171 Real Casino Slots 172 Bonus of Vegas Slots Casino 173 Multi-Strike Poker™ 173 Hit 7 Casino : Vegas Slots 174 Vegas Slots - 7Heart Casino 175 DoubleDown Classic Slots 175 Fantasy Springs Slots Casino	59	Huge Win! Classic Slots Game	159	Empire City Casino Slots
62Backgammon - Lord of the Board162Slots - Pharaoh's Way63Double Rich! Vegas Casino Slots163HOLD'EM OR FOLD'EM64Pokerrrr 2- Holdem, OFC, Omaha164Slingo Adventure65Poker Heat: Texas Holdem Poker165Dragon King Fishing Online66Golden Casino - Vegas Slots166Baba Wild Slots - Vegas Casino67Blackjack 21 - HOB167Royal Slots:Slot Machine Gam68High 5 Casino: Home of Slots168Praia Bingo - Bingo Games69Show Me Vegas Slots Casino App169Bingo Infinity70Texas Poker: Pokerist Pro170Vegas Craps by Pokerist71Texas Holdem Poker171Real Casino Slots72Billion Cash Slots-Casino Game172Bonus of Vegas Slots Casino73Multi-Strike Poker™173Hit 7 Casino : Vegas Slots74Vegas Slots - 7Heart Casino174Real Slots Best Bet Casino™75DoubleDown Classic Slots175Fantasy Springs Slots Casino	60	Slots DoubleDown Fort Knox	160	Diamond Sky: Slots & Lottery
63Double Rich! Vegas Casino Slots163HOLD'EM OR FOLD'EM64Pokerrrr 2- Holdem, OFC, Omaha164Slingo Adventure65Poker Heat: Texas Holdem Poker165Dragon King Fishing Online66Golden Casino - Vegas Slots166Baba Wild Slots - Vegas Casino67Blackjack 21 - HOB167Royal Slots:Slot Machine Gam68High 5 Casino: Home of Slots168Praia Bingo - Bingo Games69Show Me Vegas Slots Casino App169Bingo Infinity70Texas Poker: Pokerist Pro170Vegas Craps by Pokerist71Texas Holdem Poker171Real Casino Slots72Billion Cash Slots-Casino Game172Bonus of Vegas Slots Casino73Multi-Strike Poker™173Hit 7 Casino: Vegas Slots74Vegas Slots - 7Heart Casino174Real Slots Best Bet Casino™75DoubleDown Classic Slots175Fantasy Springs Slots Casino	61	Casino Games - Infinity Slots	161	Poker Night in America
64Pokerrrr 2- Holdem, OFC, Omaha164Slingo Adventure65Poker Heat: Texas Holdem Poker165Dragon King Fishing Online66Golden Casino - Vegas Slots166Baba Wild Slots - Vegas Casino67Blackjack 21 - HOB167Royal Slots:Slot Machine Gam68High 5 Casino: Home of Slots168Praia Bingo - Bingo Games69Show Me Vegas Slots Casino App169Bingo Infinity70Texas Poker: Pokerist Pro170Vegas Craps by Pokerist71Texas Holdem Poker171Real Casino Slots72Billion Cash Slots-Casino Game172Bonus of Vegas Slots Casino73Multi-Strike Poker™173Hit 7 Casino: Vegas Slots74Vegas Slots - 7Heart Casino174Real Slots Best Bet Casino™75DoubleDown Classic Slots175Fantasy Springs Slots Casino	62	Backgammon - Lord of the Board	162	Slots - Pharaoh's Way
65 Poker Heat: Texas Holdem Poker 66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 74 Vegas Slots - 7Heart Casino 75 DoubleDown Classic Slots 168 Baba Wild Slots - Vegas Casino 169 Baba Wild Slots - Vegas Casino 169 Bringo Infinity 169 Bingo Infinity 170 Vegas Craps by Pokerist 171 Real Casino Slots 172 Bonus of Vegas Slots Casino 173 Hit 7 Casino: Vegas Slots 174 Real Slots Best Bet Casino™ 175 Fantasy Springs Slots Casino 176 Casino	63	Double Rich! Vegas Casino Slots	163	HOLD'EM OR FOLD'EM
66 Golden Casino - Vegas Slots 67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 74 Vegas Slots - 7Heart Casino 75 DoubleDown Classic Slots 166 Baba Wild Slots - Vegas Casino 167 Royal Slots - Vegas Casino 168 Praia Bingo - Bingo Games 169 Bingo Infinity 170 Vegas Craps by Pokerist 171 Real Casino Slots 172 Bonus of Vegas Slots Casino 173 Hit 7 Casino: Vegas Slots 174 Real Slots Best Bet Casino™ 175 Fantasy Springs Slots Casino 176 Casino 177 Fantasy Springs Slots Casino™	64	Pokerrrr 2- Holdem, OFC, Omaha	164	Slingo Adventure
67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 74 Vegas Slots - 7Heart Casino 75 DoubleDown Classic Slots 167 Royal Slots:Slot Machine Gam 168 Praia Bingo - Bingo Games 169 Bingo Infinity 170 Vegas Craps by Pokerist 171 Real Casino Slots 172 Bonus of Vegas Slots Casino 173 Hit 7 Casino: Vegas Slots 174 Real Slots Best Bet Casino™ 175 Fantasy Springs Slots Casino	65	Poker Heat: Texas Holdem Poker	165	Dragon King Fishing Online
67 Blackjack 21 - HOB 68 High 5 Casino: Home of Slots 69 Show Me Vegas Slots Casino App 70 Texas Poker: Pokerist Pro 71 Texas Holdem Poker 72 Billion Cash Slots-Casino Game 73 Multi-Strike Poker™ 74 Vegas Slots - 7Heart Casino 75 DoubleDown Classic Slots 167 Royal Slots:Slot Machine Gam 168 Praia Bingo - Bingo Games 169 Bingo Infinity 170 Vegas Craps by Pokerist 171 Real Casino Slots 172 Bonus of Vegas Slots Casino 173 Hit 7 Casino: Vegas Slots 174 Real Slots Best Bet Casino™ 175 Fantasy Springs Slots Casino	66	Golden Casino - Vegas Slots	166	Baba Wild Slots - Vegas Casino
69Show Me Vegas Slots Casino App169Bingo Infinity70Texas Poker: Pokerist Pro170Vegas Craps by Pokerist71Texas Holdem Poker171Real Casino Slots72Billion Cash Slots-Casino Game172Bonus of Vegas Slots Casino73Multi-Strike Poker™173Hit 7 Casino : Vegas Slots74Vegas Slots - 7Heart Casino174Real Slots Best Bet Casino™75DoubleDown Classic Slots175Fantasy Springs Slots Casino	67	Blackjack 21 - HOB	167	Royal Slots:Slot Machine Games
69 Show Me Vegas Slots Casino App 169 Bingo Infinity 70 Texas Poker: Pokerist Pro 170 Vegas Craps by Pokerist 71 Texas Holdem Poker 171 Real Casino Slots 72 Billion Cash Slots-Casino Game 172 Bonus of Vegas Slots Casino 73 Multi-Strike Poker™ 173 Hit 7 Casino : Vegas Slots 74 Vegas Slots - 7Heart Casino 174 Real Slots Best Bet Casino™ 75 DoubleDown Classic Slots 175 Fantasy Springs Slots Casino	68	High 5 Casino: Home of Slots	168	Praia Bingo - Bingo Games
70Texas Poker: Pokerist Pro170Vegas Craps by Pokerist71Texas Holdem Poker171Real Casino Slots72Billion Cash Slots-Casino Game172Bonus of Vegas Slots Casino73Multi-Strike Poker™173Hit 7 Casino : Vegas Slots74Vegas Slots - 7Heart Casino174Real Slots Best Bet Casino™75DoubleDown Classic Slots175Fantasy Springs Slots Casino	69	Show Me Vegas Slots Casino App	169	
71Texas Holdem Poker171Real Casino Slots72Billion Cash Slots-Casino Game172Bonus of Vegas Slots Casino73Multi-Strike Poker™173Hit 7 Casino : Vegas Slots74Vegas Slots - 7Heart Casino174Real Slots Best Bet Casino™75DoubleDown Classic Slots175Fantasy Springs Slots Casino	70	.,	170	
73Multi-Strike Poker™173Hit 7 Casino : Vegas Slots74Vegas Slots - 7Heart Casino174Real Slots Best Bet Casino™75DoubleDown Classic Slots175Fantasy Springs Slots Casino	71	Texas Holdem Poker	171	Real Casino Slots
73Multi-Strike Poker™173Hit 7 Casino : Vegas Slots74Vegas Slots - 7Heart Casino174Real Slots Best Bet Casino™75DoubleDown Classic Slots175Fantasy Springs Slots Casino	72	Billion Cash Slots-Casino Game	172	Bonus of Vegas Slots Casino
74Vegas Slots - 7Heart Casino174Real Slots Best Bet Casino™75DoubleDown Classic Slots175Fantasy Springs Slots Casino	73		173	
75 DoubleDown Classic Slots 175 Fantasy Springs Slots Casino	74		174	-
				'
77 Mega Hit Poker: Texas Holdem 177 Blackjack				, ,
78 Hard Rock Social Casino 178 Teen Patti by Octro				
 				SpinToWin Slots & Sweepstakes
				Teen Patti Gold, Poker & Rummy

81	Bingo Frenzy: BINGO Cooking!	181	Texas Poker
82	82 Slots Casino - Jackpot Mania		Hard Rock Blackjack & Casino
83	83 Slots Casino: Vegas Slot Games		Vegas Nights Slots
84	84 Slots Games: Hot Vegas Casino		Lucky North Casino Slot Games
85	85 Magic Vegas Casino		Bingo!™
86	86 Vegas Casino Slots - Mega Win		HD Poker: Texas Holdem
87	87 SLOTS - Black Diamond Casino		Cashmania Slots: Slot Games
88	Backgammon Live™ Board Game	188	Blackjack 21-World Tournament
89	The Walking Dead Casino Slots	189	Blackjack 21: Live Casino game
90	Jackpotjoy Slots: Vegas Casino	190	Super Jackpot Slots Casino
91	91 Old Vegas Classic Slots Casino		Keno 4 Multi Card
92	92 FaFaFa™ Gold Slots Casino		Binion's Casino
93	Lucky Time Slots™ Vegas Casino	193	Lottery Scratchers
94	Video Poker Classic - 39 Games	194	Fishing Casino - Ocean King
95	Stars Casino Slots	195	Bingo PartyLand: BINGO! & Spin
96	Clubillion™: casino slots game	196	GamePoint Bingo
97	Lucky Lottery Scratchers	197	American Scratchers Lottery
98	Bingo Drive: Play & Win Online	198	Ever Rich Slots
99	Abradoodle Bingo: Fun Bingo!	199	Keno Bonus Play
100	Cash Fever Slots™-Vegas Casino	200	Spider Solitaire: Card Game

- 11. Plaintiff Frank Custodero downloaded and played one of these casino-style gambling games. Prior to March of 2019, he downloaded Cash Frenzy. During that month, he began purchasing coins through the app so he could continue to play for a chance to win free coins that would enable him to enjoy the game for a longer period of time. In the three months prior to the filing of this complaint, he paid \$2,085.40 to Apple for the privilege of continuing to play the illegal gambling game.
- 12. A customer such as plaintiff does not have the ability to collect actual cash as a result of "winning" games, but he does have the ability to win and therefore acquire more playing time. New York's gambling statutes make clear that paying money in a game for a chance to win more playing time constitutes illegal gambling under New York law. Section 225.00 of the New York Penal Code defines "something of value" for purposes of the state gambling laws as:

"Something of value" means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

A game where a patron pays money for the chance to win more playing time without charge violates New York law.

13. Apple is not some minor or incidental participant in these illegal gambling games. It is the principal promoter and facilitator of the illegal activity. Apple maintains dictatorial control over what apps can be downloaded from the App Store, and the payment method to purchase inapp items. As the maker of the Fortnite game alleged in a recent antitrust injunction lawsuit against Apple:

Apple also imposes unreasonable restraints and unlawfully maintains a total monopoly in the iOS In-App Payment Processing Market. Among the oppressive terms that app developers have to accept, Apple coerces all app developers who wish to use its App Store—the only means with which to distribute apps to iOS users—to use exclusively Apple's own payment processing platform for all in-app purchases of in-app content.

Complaint for Injunctive Relief, *Epic Games v. Apple, Inc.*, in the United States District Court for the Northern District of California, August 13, 2020 ¶ 10 (copy attached). As noted, Apple uses its unfettered control over apps played on iOS to extract a hefty 30% tax on all purchases made to buy apps or in-app content such as "coins" to gamble with.

14. Apple has the ability, which it has employed on other apps, to geo-restrict games so that they can only be played in certain states. In fact, with cash-out gambling games it regularly restricts those game so that they can only be played in states where that type of gambling is legal. Apple has also restricted gambling games such as the ones made the basis of this lawsuit so that minors cannot download or play them. It has the ability with existing technology it currently uses to prevent the games at issue here from being played in this state.

- 15. Apple's App Store is not just a venue to buy iOS apps. It is a promotional tool. Apple heavily promotes apps, such as the illegal gambling games that form the basis of this complaint, that promise to bring in revenue. Revenue from the App Store is the reason Apple is the most valuable company on the planet.
 - 16. Thus, Apple enables, permits, promotes, and profits from illegal gambling.

NEW YORK LEGAL FRAMEWORK

- 17. New York has a strong public policy against gambling in this state. The state's strong public policy against gambling includes a statutory right of persons who spend money on illegal gambling to recover their money.
- at Sections 225.00 through 225.95. Section 225.05 states "A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity." Section 225. According to Section 225.95, a person commits the crime of "unlawful manufacture, sale, distribution, marking, altering or modification of equipment and devices associated with gaming" when he or she "[m]anufactures, sells or distributes any cards, chips, cheques, tokens, dice, vouchers, game or device and he or she knew or reasonably should have known it was intended to be used to violate any provision of this article." N.Y. Penal Law § 225.95.
- 19. As already noted, "something of value" is not limited under New York law to the situation where one gambles in the hopes of winning actual cash money. Rather, "something of value" specifically includes anything "involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge." N.Y. Penal Law § 225.00. As a matter of law, paying money to get "coins" one bets hoping to win more "coins" so as to gain the

"privilege of playing at a game or scheme without charge" is gambling a thing of value under New York law.

- 20. As to the prohibition of "promoting" gambling in Section 225.05, the statute states that a person is guilty of this crime if he "knowingly advances or profits from unlawful gambling activity." N.Y. Penal Law § 225.05. By promoting, and receiving the proceeds from the illegal gambling games, Apple clearly "advances" and "profits from" illegal gambling. It is therefore guilty of promoting gambling in the second degree under Section 225.05.
- 21. New York provides a statutory civil cause of action to recover money paid and lost due to gambling. Section 5-421 of the General Obligation Law provides:

Every person who shall, by playing at any game, or by betting on the sides or hands of such as do play, lose at any time or sitting, the sum or value of twenty-five dollars or upwards, and shall pay or deliver the same or any part thereof, may, within three calendar months after such payment or delivery, sue for and recover the money or value of the things so lost and paid or delivered, from the winner thereof.

N.Y. General Obligations Law § 5-421.

CLASS ALLEGATIONS

22. Plaintiff seeks to certify and represent a class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The class sought to be certified is:

All New York residents who downloaded, played, and paid money for additional coins within games from the Apple App Store that featured slots, roulette, blackjack, poker, keno, craps, and other kinds of casino-style gambling games, bingo, or simulations thereof, where the player had a chance to win coins or other means to play for additional periods of time, during a period commencing three months before the filing of this complaint and continuing to a date to be set by the Court following certification. All employees of the Court, and plaintiff's counsel and their families are excluded.

23. This class action satisfies the numerosity requirement of Rule 23(a)(1) because joinder of all members of the plaintiff class is impracticable. There are thousands of New York residents who are members of the class.

- 24. It also satisfies the commonality requirement of Rule 23(a)(2) because there are central questions of fact and law that are common to the class. Such common questions include, at a minimum, (a) whether these virtually identical gambling games sold through the App Store violate New York's prohibition on illegal gambling; (b) whether gambling for additional play-time is a thing of value under New York law; (c) whether Apple promoted gambling through its participation in the sale of in-app purchases through the App Store; and (d) whether plaintiff and the class members are entitled to recover their money pursuant to Section 5-421 of the General Obligation Law.
- 25. The proposed class satisfies the typicality requirement of Rule 23(a)(3) because the named plaintiff's claims are typical of the claims of the class members. Both plaintiff and the class members lost money in an effort to win additional play-time on these illegal gambling games.
- 26. The named plaintiff will fairly and adequately represent the interests of the class pursuant to Rule 23(a)(4). Plaintiff has no interests that conflict with the interests of the class. Furthermore, plaintiff has retained competent and experienced counsel with decades of experience litigating class cases.
- 27. Plaintiff seeks certification of a class pursuant to Rule 23(b)(3), which allows class treatment of a claim where:
 - (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
 - (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
 - **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;

- **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- **(D)** the likely difficulties in managing a class action.
- 28. The common questions of law and fact in this case vastly predominate over any individual issues affecting only individual class members. The *only* individual issue presented by these class members is the exact amount of money damages to which each class member is entitled. Such damages issues are routinely held not to predominate over common questions in cases like this. Indeed, the individual damages issues will be quickly and accurately determined by examining Apple's own records.
- 29. Class treatment is by far superior to individual litigation as a fair and efficient way to adjudicate this controversy. Given the relatively small individual amounts at issue, it unlikely whether there would be any adjudication at all without use of the class device. No individual class member would rationally commence and prosecute a lawsuit where the individual amount in controversy likely would not exceed the filing fees.
- 30. For this reason, none of the class members have any interest in controlling the prosecution of separate actions.
- 31. Likewise, to our knowledge, no class member has already commenced an action concerning this controversy.
- 32. It would much more desirable to concentrate this case in one action rather than allow the prosecution of individual actions because, as noted, such individual actions would likely never be filed because there would be no motivation for any individual class member to file an individual suit.

33. We foresee no particular difficulties in managing this case as a class action because 100% of the necessary information to compensate the individual class members is contained in Apple's own records concerning purchases made through the App Store.

CAUSE OF ACTION

34. Plaintiff, on his own behalf and on behalf of those similarly situated, seek recovery of all sums paid through in-app purchases in these games made through Apple's App Store pursuant to Section 5-421 of the New York General Obligations Law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that the Court:

- 1. Take jurisdiction of this cause;
- 2. Following discovery, certify this case as a class action pursuant to Rule 23(b)(3);
- 3. Appoint plaintiff's counsel as Class Counsel and the named plaintiff as class representative;
- 4. Enter a final judgment against Apple, Inc., awarding plaintiff and the class members a refund of all money paid through the illegal gambling games described herein;
- 5. Award Class Counsel reasonable attorneys' fees and expenses to be paid out of the judgment in favor of the class;
- 6. Award the named plaintiff a reasonable sum of money for services in this case on behalf of the class, also to be paid out of the judgment in favor of the class;
- 7. Award interest and costs; and
- 8. Award any other relief to which the Court finds plaintiff and the class are entitled.

Dated: New York, New York October 22, 2020

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